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83-42

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Hagerstown Kitchens, Inc.,

Petitioner

versus

Board of County Commissioners of Washington County and Washington County Department of Permits and Inspections,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Paul Victor Jorgensen, Esquire
Jorgensen & Jorgensen
215 West Main Street
Post Office Box 446
Middletown, Maryland 21769
(301) 293-2212

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented by the instant petition:

1. Whether a building permit validly issued and upon which the permittee has proceeded with construction in good faith confers a property interest subject to the due process and "taking" protections of the Fourteenth Amendment.

2. Whether the imposition of additional and oppressive building code conditions by a local government on a manufacturing plant which are at variance with a lawfully issued building permit for the plant is a violation of the due process clause of the Fourteenth Amendment for which the local government may be liable for compensatory damages under Section 1983 of Title 42 of the United States Code.

LIST OF ALL PARTIES TO THE PROCEEDING

1. HAGERSTOWN KITCHENS, INC., the Petitioner, is a corporation organized and incorporated under the laws of Maryland, and was the Plaintiff in proceedings brought in the United States District Court for the District of Maryland, and was the Appellant in a subsequent appeal to the Fourth Circuit. 1/

2. BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, a Respondent, is a county duly incorporated and organized under the laws of Maryland and was a Defendant in proceedings brought in the United States District Court for the District of Maryland, and was an Appellee in a subsequent appeal to the Fourth Circuit

3. WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, a Respondent, is an agency of the Respondent Board of County

LIST OF ALL PARTIES TO THE PROCEEDING

(Cont'd.)

Commissioners of Washington County, and was a Defendant in proceedings brought in the United States District Court for the District of Maryland, and was an Appellee in a subsequent appeal to the Fourth Circuit.

1/ Hagerstown Kitchens, Inc. is a closed corporation located in Maryland and has no parent companies, subsidiaries, or affiliates.

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REFERENCE TO REPORTS OF OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit issued on April 12, 1983, appears as Appendix A hereto. The opinion of the District Court issued on July 29, 1982, appears as Appendix B hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgement of the United States Court of Appeals for the Fourth Circuit was dated and entered April 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.(1) and 28 U.S.C. 2101(C).

CONSTITUTIONAL PROVISIONS, STATUES AND ORDINANCES INVOLVED

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment

(Section 1. Citizens of the United States.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * *

(Section 5. Power to enforce amendment.)

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"

42 U.S.C. 1983. Civil action for deprivation of rights.

"Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In 1976, the Petitioner expanded its cabinet and woodworking factory in Hagerstown, Maryland. This expansion was undertaken in accordance with a validly issued building permit that did not require a fire sprinkler system. After construction was already nearly complete, the Respondent Washington County Department of Permits and Inspections ordered the Petitioner to install sprinkler systems throughout its entire structure. Because the original plans did not include such a system, the system had to be added at an enormous additional cost which exceeded the price paid for the original expansion.

Following those events, the Petitioner, Hagerstown Kitchens, Inc., brought this action under 42 U.S.C. 1983 to recoup its additional expenses resulting from the

Defendant Washington County's subsequent impairment of vested building permits. Upon a review of the Complaint, briefs from both sides, and excerpts from prior state administrative proceedings selected by the County, the District Court dismissed the Complaint. Because the Complaint already fully and accurately depicted the facts, the dismissal amounted to a final judgement in this case.

The Complaint stated that "For a period of time prior to and including June, 1976, it was a custom and common practice for officers of the Defendant to grant building and use permits to commercial enterprises in Washington County, Maryland, and then later, after substantial reliance and expense incurred on the part of the permitees, to revoke permits and impair the uses of private property." (Complaint, paragraph 8.)

The Complaint further stated that Hagerstown Kitchens constructed a warehouse and manufacturing plant in Hagerstown, in reliance on and in accordance with building permits issued by the County. (Complaint, paragraphs 8-9.) After the warehouse was already complete, and remodelling pursuant to the approved permit already in substantial progress, the County ordered Hagerstown Kitchens to install an automatic sprinkler system throughout the entire structure. (Complaint, paragraph 11.) This demand was dropped, however, and Hagerstown Kitchens completed the structure in accordance with the original permit as previously approved by the County. (Complaint, paragraphs 12-13.)

Four years after the completion of the construction, the County gave notice to Hagerstown Kitchens that they intended to take formal action and press charges against

Hagerstown Kitchens for purported code violations due to the lack of an automatic fire extinguishing system. (Complaint, paragraph 14.) Hagerstown Kitchens appealed this decision to the Defendant Board of County Commissioners of Washington County, which partially vacated the apparent order, but conditioned its ruling by requiring that said order would be enforced in the event of any change in use, renovation of or expansion of the structure. (Complaint, paragraph 15.)

Hagerstown Kitchens' Complaint stated that the County's actions in this matter were in violation of the due process clause of the Constitution: "Plaintiff, legally authorized in fact to proceed, commenced and completed substantial construction in reliance on the permit and the process which produced it. The County subsequently,

arbitrarily and capriciously, but consistent with their policy and practice alleged in paragraph 10, acted to deprive Plaintiff of permitted uses and of substantial property rights." (Complaint, paragraph 18.)

The District Court dismissed the Petitioner's complaint on motion by the Respondents, declaring that "Nothing in the record supports the accusation of arbitrariness" and that the record failed to establish an actionable violation of property rights since the government regulation must deprive the landowner of all reasonable uses of the land. The United States Court of Appeals for the Fourth Circuit affirmed the dismissal, arguing that Maryland law does not recognize any right to construct a noncomplying structure if the building permit does not comply with existing building codes, and

that the requirement of a fire sprinkler system is a reasonable exercise of police powers by municipalities. Neither court addressed the vested rights argument propounded by the Petitioner in relation to its interest in the building permit.

ARGUMENT - REASONS FOR GRANTING THE WRIT

1. A Building Permit Validly Issued and Upon Which the Permittee Has Proceeded With Construction In Good Faith Confers a Property Interest Subject to the Due Process and Taking Protections of the Fifth and Fourteenth Amendments

This case concerns the proper exercise of a local government's police powers in the issuance and enforcement of building permits. Land use regulation in the United States is universally implemented through the isssuance of building permits, occupance permits, zoning

certificates, and similar government-backed documents symbolizing the fulfillment of local regulaory conditions. The building permit is used by most local goverments to certify that the various building codes, zoning regulations, and health and safety laws have been or will be satisfied provided that the contemplated development is carried out in accordance with the permit conditions. See Cunningham & Kremer, "Vested Rights, Estoppel and the Land Development Process," 29 Hastings Law Journal 623 (1978). Hence, the building permit is essentially a guarantee by the local government that it will not exercise its police powers to thwart private development undertaken in accordance with the permit.

The Fourth Circuit's decision in this case failed to recognize the limitations that the issuance of a valid building permit imposed on the local government defendants. While the lower court's statement

that private property is subject to the reasonable exercise of police powers to further the public welfare cannot be disputed, the intrinsic nature of a building permit is to delineate the boundaries between regulatory police powers and private developments. The fundamental thrust of Hagerstown Kitchen's Complaint was not that the defendants lacked authority to regulate development, but that the retroactive exercise of that authority was unreasonable and oppressive, and effectively destroyed the guarantees provided by the building permits without compensation for those guarantees.

Earlier cases of this Court establish that a governmental promise or obligation, such as that contained in a building permit, may under appropriate circumstances constitute property subject to the protections of the Fourteenth Amendment. In Goldberg v. Kelly, 397 U.S. 254 (1970) this

Court ruled that welfare benefits could not terminate without consideration of due process. In Board of Regents v. Roth, 408 U.S. 564 (1971), this Court established the following principles in determining whether a particular benefit is property entitled to the protection of the Fourteenth Amendment:

> "To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. * * * *
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id.

The case law of Maryland, the state in which the building permits of Hagers-

town Kitchens were issued, states that an owner obtains a vested development right which may not be revoked by subsequent zoning enactments or amendments provided that the following two conditions are met: 1) The owner has obtained a legally issued permit required by the applicable ordinance, and 2) The owner has commenced visible development pursuant to the permit with the intention and purpose of continuing it until completion of the building. Pemberton v. Montgomery County, 340 A.2d 240 (Md. 1975); Richmond Corp. v. Bd. of County Commissioners, 255 A.2d 198 (1969). Therefore, a building permit which is vested in Maryland also satisfies the criteria for property protected by the Fourteenth Amendment.

The lower court's decision implies that the Complaint failed to show a deprivation of a property interest because "Maryland law recognizes no right to con-

struct a noncomplying structure if the building permit does not comport with existing building codes." Appendix A, p. A-6. However, nothing in the record indicated that Hagerstown Kitchens' building permits failed to comply with existing building codes. On the contrary, Paragraph 12 of the Complaint characterized the permit giving rise to the action as "validly issued." Neither the lower courts nor the Respondents have ever identified any ordinance, law, or regulation which mandated the retroactive conditions sought to be imposed on the factory of Hagerstown Kitchens. The only authority for the requirement of a sprinkler system was the discretionary judgment of the building administrator.

In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), this Court held that the taking provision of the Fifth Amendment was incorporated by the

due process clause of the Fourteenth Amendment. Under the taking provision, a local government must pay compensation before it can "take" property for public use. Hence the failure of a government to provide compensation for the taking of a distinct property right, such as that conferred by a vested building permit, is a violation of both the due process clause and the taking provision.

The Fourth Circuit's argument that the revocation of the building permit was not a taking because it did not deprive Hagerstown Kitchens of all reasonable uses of its land ignores the fact that the building permit itself was a "distinct investment-backed expectation" (Penn Central Transp. Co. v. New York City, supra at 127) deserving of constitutional protection apart from the land. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), this Court found that a statute forbidding the

the mining of coal except under certain conditions operated to "take" the plaintiff's mineral rights in property owned by others. In Armstrong v. United States, 364 U.S. 40 (1960), the Court ruled that the goverment's destruction of a materialman's lien in certain property was a "taking." The court found a taking requiring compensation in both cases not because the land was "taken", but because a property interest distinct from the land was destroyed.

Likewise, in this case the local government's retroactive conditions effectively nullified the guarantees of the building permit. In essence, the government's action signaled its unwillingness to be constrained in the exercise of its police powers by the building permit, thereby cancelling the entire purpose of the building permit. Like the mineral rights in Pennsylvania Coal, supra, and like the lien in

Armstrong, supra, Hagerstown Kitchens' building permit was "taken" by governmental action.

Moreover, an additional violation of due process occurs if the local government's action was oppressive, arbitrary, or capricious. Sixth Camden Corp. v. Burlington County, 420 F.Supp. 709 (D.C. N.Y. 1976). In Jacobson v. TRPA, 566 F.2d 1353 (1977), property owners in the scenic Lake Tahoe region brought an action to obtain damages and declaratory relief from the Tahoe Regional Planning Authority, a land use regulatory agency created by interstate compact between Nevada and California. The plaintiffs posed two alternative theories: 1) Inverse condemnation, and 2) Abuse of the state's police power in violation of the due process clause of the Fourteenth Amendment. The Ninth Circuit ruled that an action under the due process clause had been stated because the

plaintiffs had alleged that the the TRPA had exercised its police powers improperly:

> "Appellants do allege facts sufficient to support a claim under the due process clause. As the Supreme Court has stated:
>
> > 'Due process of law in the (Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress according to the limits therein prescribed, and interpreted according to the principles of the common law.' Hurtado v. California, 110 U.S. 516, 535 (1884).
>
> The Compact is a 'law of the land,' deriving its authority from powers conferred upon Congress by the Constitution. The due process clause was intended to protect the liberty and property interests of individuals from invasion by the arbitrary and oppressive exercise of power by the federal government. Since appellants allege such an invasion of their property interests, they have stated a cause of action under the Fifth Amendment." Jacobson v. TRPA, supra at 1359.

The Jacobson v. TRPA holding was reviewed by the Supreme Court as to certain immunity issues not pertinent to this case, and was reversed in part, and affirmed in part. Lake Country Estates, Inc. v. TRPA,

440 U.S. 391 (1979). The Court, however, left unchanged the basic cause of action found by the Ninth Circuit as stated above.

In this case, the arbitrary nature of the government's action was manifest, not because the government required building conditions such as the installation of a sprinkler system, but because it waited to require the conditions until after Hagerstown Kitchens had already completed substantial construction in good faith reliance on a validly issued permit. Paragraph 8 of the Complaint stated that it was a practice of the defendants to grant building permits, and subsequently revoke them after substantial reliance and expense had been incurred by the permittees. The record is devoid of any rational explanation as to why these conditions were not required before the issuance of the permits, which should have encapsulated all existing

requirements. In view of the fact that no mechanism existed for the compensation of the nullified building permit, the local government could not have rationally or fairly waited to impose such requirements until after substantial reliance by Hagerstown Kitchens.

2. The Imposition of Additional and Oppressive Building Requirements By a Local Government Give Rise to An Action Against the Local Government by the Owner for Compensation and Damages Under 42 U.S.C. 1983.

Congress has enacted 42 U.S.C. 1983 to remedy constitutional violations such as this. In Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978), the Court cited legislative history which shows very strongly that 42 U.S.C. 1983 provides a remedy where a local government has act-

ed in an arbitrary mannery which destroys vested property rights without compensation:

> "Representative Bingham, for example, in discussing Section 1 of the bill, explained that he had drafted Section 1 of the Fourteenth Amendment with the case of Barron v. Mayor of Baltimore, 7 Pet 243, 8 L Ed 672 (1833), especially in mind. 'In (that) case the city had taken private property for public use, without compensation. . . , and there was no redress for the wrong. . . .' Globe App 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings by cities, as had occurred in Barron, would be redressable under Section 1 of the bill. See Globe App 85. More generally, and as Bingham's remarks confirm, Section 1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that amendment unequivocally prohibits uncompensated takings." Id. at 686-7.

"Section 1 of the bill," referred to in the quote above, is 42 U.S.C. 1983.

Moreover, Hagerstown Kitchens' Complaint seeks compensation and damages under 42 U.S.C. 1983, not injunctive relief. The Petitioner is not asking that its interests be balanced against the public

welfare or questioning the wisdom of safety regulations. Rather, the Petitioner is seeking damages and compensation for injury caused by the issuance and revocation of a vested building permit upon which it relied. A Washington appellate court has succintly summarized the powerful logic behind such a remedy:

> "The issuance of a building permit should not vest rights which can be exercised against the public interest but a change in position made in justifiable reliance upon the approval of the building permit should give rise to a right to recover damages suffered. We hold that a building inspector may not issue a building permit without exercising due care to see that the permittee's plans and specifications comply with the applicable codes and ordinances and, when the permittee has acted in reliance on the permit issued, disclaim all liability and responsibility for the permitee's plight.
>
> The approach of many courts, in finding a municipality estopped by its actions from denying liability, has been to forbid the revocation of the building permit and permits the continuance of construction. We see no reason to punish the public in this manner by permitting construction which is either dangerous or inimical

> to the general welfare. It would be detrimental to the neighborhood and to the public to allow the construction of a building which would block future widening of a street when the need to do so in the future reasonably can be forseen. This does not mean, however, that the permittee has no recourse for the damage inflicted upon him. Nor does it mean that officials and building inspectors can approach their duties frivolously, knowing that even if they are careless and sloppy in the performance of their work that they will not be held to answer for their actions and the municipality can be indifferent to the injury inflicted.
>
> The permittees in such situations should be entitled to damages for the losses caused by the municipality's negligence, reduced by the percentage of the permittee's own contributory negligence." J & B Development Co., Co., Inc. v. King County, 630 P.2d 1002, 1010 (Wash., 1981).

See also Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir., 1981) (Damages are available after regulations were changed to revoke a validly issued building permit).

Although the above language of the court in J & B Development Co., Inc. v. King County, supra, is based on state law, the same analysis is applicable in determining

the appropriate remedy to the constitutional violations alleged in this case. Compensatory relief satisfies the constitutional imbalance caused by the Respondents' actions in a manner that does not threaten the public interest.

CONCLUSION

This case highlights the confusion and need for guidance from this Court that now exist in the area of land use regulation. The time is ripe for a decision setting forth the limits of the use of the police powers in regulating development. The Petitioner respectfully prays that a Writ of Certiorari issue herein to the United States Court of Appeals to the Fourth Circuit, and that the judgment and order of that court be reversed and this case remanded for trial.

Respectfully Submitted,

PAUL VICTOR JORGENSEN
Attorney for Petitioner

Jorgensen & Jorgensen
215 West Main Street
P.O. Box 446
Middletown, Maryland
21769

(301) 293-2212

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1763

Hagerstown Kitchens, Inc.,

Appellant,

versus

Board of County Commissioners of
Washington County
and
Washington County Department of
Permits and Inspections,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Judge.

Argued: February 7, 1983

Decided: April 12, 1983

Before ERVIN, CHAPMAN, Circuit Judges and BRYAN, Senior Circuit Judge.

Paul V. Jorgensen for Appellant: Paul V. Niemeyer (Michael C. Powell, Piper & Marbury on brief) for Appellees.

BRYAN, Senior Circuit Judge:

Hagerstown Kitchens, Inc. (Hagerstown), appeals the sustaining of a demurrer by the Federal District Court of Maryland as to its complaint against Washington County's Board of County Commissioners and the County's Department of Permits and Inspections. The trial court held the pleading demurrable and so dismissed on an appellees' motion, see Fed. R. Civ. P. 12(b) (6). Perceiving no error in that determination, we affirm.

I

In 1976, when appellant renovated its facilities, the Department issued a building permit that did not mention installation of a fire sprinkler system, although shortly thereafter it advised Hagerstown that such system was probably required by the applicable building code. Despite two such warnings, construction proceeded without heed. Finally, in April, 1980, the Department ordered appellant to place sprinklers throughout its plant. Hagerstown protested to the

Board which rescinded the order on condition that, if appellant should change the use of, renovate or expand the structure, then at that time it would be required to install a sprinkler system.

Still unsatisfied, Hagerstown appealed the Board's decision to the Circuit Court for Washington County. Then, in an apparent change of strategy, it moved to dismiss in that forum, and instead filed this action against the Department and the Board in the United States District Court of Maryland, seeking declaratory and monetary relief based on 42 U.S.C. 1983 and the due process clause of the Fourteenth Amendment. The Board and the Department responded with a motion to dismiss. The District Court acceeded to dismissal, and this appeal followed.

II

Appellees primarily urge that further consideration of these questions is pre-

cluded by the prior litigation. The argument is that, by operation of Maryland's rules of procedure, Hagerstown's failure to refile the State administrative appeal thirty days after its voluntary dismissal converted the omission into a conclusive final judgement as to all issues which were, or might have been, raised in the Circuit Court. See Md. R. P. BB 4a & BB 5.

This suggestion is without merit. Because the State court action was dismissed without prejudice before trial, there was no final judgement on the merits of the matter sought to be precluded here. Lack of such a judgement defeats the plan of both res judicata and collateral estoppel. See 1B J. Moore & T. Currier, Moore's Federal Practice 0.409(1) & 0.441(2) (2d ed. 1982).

With this contention out of the way, we consider whether the District Court properly granted appellees' motion to dismiss.

The test is whether the pleadings, with all material allegations accepted and liberally construed in favor of the pleader, describe a claim good in law which entitles the pleader to relief. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Hagerstown seeks to recover on the theory that its due process rights were violated by enforcement of the building code. Yet, if "(t)he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" Mathews v. Eldridge, 424 U.S. 319, 333 (1975) (citation omitted), then the building code is constitutionally sound. The ordinance grants affected property owners a full hearing before the Board. At this hearing Hagerstown presented in detail all the reasons for its disagreement with the Department's order. From this full hearing, moreover, an appeal lies to the Circuit Court for Washington County.

The complaint states no facts establishing the deprivation of a property interest within the meaning of the due process clause. Maryland law recognizes no right to construct a noncomplying structure if the building permit does not comport with existing building codes. See Town of Berwin Heights v. Rogers, 228 Md. 271, 179 A2d 712 (1962).

The Board's order, as modified, requires future installation of a sprinkler system in the event the structure is changed in any way, but before a court may conclude that there has been an unconstitutional taking of property, the government must deprive the landowner of all reasonable uses of his land. United States v. Central Eureka Mining Company, 357 U.S. 155 (1958); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978). Interests in private property, moreover, are always subject to the reasonable exercise of police powers by municipalities to further the public welfare.

A regulation demanding the installation of a fire sprinkler system is just such a reasonable restriction, Queenside Hills Realty v. Saxl, 328 U.S. 80, 83 (1946).

The judgement of the District Court is

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-82-832

Hagerstown Kitchens, Inc.

versus

Board of County Commissioners Of
Washington County, et al.

Filed: July 19, 1982

Paul V. Jorgensen, Esquire
Middletown, Maryland
Counsel For The Plaintiff

Paul V. Niemeyer, Esquire
Baltimore, Maryland
and
Thomas E. Plank, Esquire
Baltimore, Maryland
Counsel For The Defendants

YOUNG, United States District Judge

MEMORANDUM OPINION AND ORDER

Plaintiff, Hagerstown Kitchens, renovated and expanded its facilities in 1976. Although the Washington County Department of Permits and Inspections ("Department") indicated at the time that a sprinkler system was probably required by the building code, it issued a permit that did not require a system. Four years later, the Department warned plaintiff that it must install sprinklers throughout its plant or discontinue its use.

When plaintiff appealed to the Board of County Commissioners of Washington County ("Board"), this order was rescinded, and Hagerstown Kitchens was allowed to continue to operate, but certain conditions were set. Plaintiff strenuously objects to one of them, that a sprinkler system must be installed if the existing structure is in any way renovated, expanded or put to a different use.

Plaintiff appealed the Board's decision

to the Circuit Court for Washington County, then moved to dismiss its appeal and filed the present complaint in the United States District Court for the District of Maryland seeking declaratory and monetary relief under 42 U.S.C. 1983 and the due process clauses of the Vth and XIVth Amendments. Defendants have filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), F. R. Civ. P.

Plaintiff alleges that the Board acted in a capricious and arbitrary manner by requiring a future installation of sprinklers. The complaint states that "it was a custom and common practice for officers of the defendant to grant building and use permits to commercial enterprises in Washington County, Maryland, and then later, after substantial reliance and expense incurred on the part of the permittees, to revoke permits and impair the use of private property."

In short, the defendant is charged with an unreasonable use of police power and disparate treatment in the exercise of that power. Nothing in the record supports the accusation of arbitrariness. Plaintiff does not demonstrate that its plant was treated differently than other facilities of comparable character. Mere conclusory allegations of disparate treatment will not create a claim for relief.

This Court has held that a plaintiff must show that governmental action caused him to suffer "grievous loss" of some kind to claim an unconstitutional violation of his rights. Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222 (D. Md. 1978). It is not enough that a governmental regulation deprives a property owner of the most profitable use of property or that the regulation causes a severe decline in the property value. Before a court can conclude that there has been an unconstitutional

taking of property, the government regulation must deprive the landowner of all reasonable uses of his land. United States v. Central Eureka Mining Company, 357 U.S. 155 (1958); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978).

Again, the record fails to establish an actionable violation of property rights. Plaintiff is free to use its existing facilities; it can expand or renovate, provided that sprinklers are installed, as is uniformly required in all buildings of such character. Hagerstown Kitchens complains that it is now "impossible" to sell the facilities burdened by the Board's conditions. It is difficult to see in a safety measure any deprivation of property without due process. A purchaser would simply have to equip the plant with sprinklers. This requirement does not make the plant "unsaleable."

It is true that the plaintiff may have

relied on the Departmetn's failure to pursue the matter for four years. However, it is clearly on notice that a sprinkler system was required. It cannot now take advantage of an administrative lapse to claim a right to a lawful non-conforming use. Francis v. MacGill, 75 A.2d 91, 196 Md. 77 (1950). Plaintiff relies on United States v. County Board of Arlington County, 487 F. Supp. 137 (D. Va. 1979) (suit against a defendant who had incurred substantial expenses in good faith was dismissed). However, that court specifically denied a motion to dismiss on laches or estoppel: "Laches, or neglect on the part of government officials is no defense to a suit to enforce a public right or protect a public interest." supra, 141.

Inherent in all building codes is the onum imposed on an owner for the sake of public safety. The requirement to which plaintiff is subject is of the sort that

permeates all such restrictions and does not amount to a denial of due process. "The police power is one of the least limitable of government powers and in its operation often cuts down on property rights." Queenside Hills Co. v. Saxl, 328 U.S. 80, 83 (1945). Buildings in which a large number of people gather, with the attendant dangers from fire, disease, traffic and noise, present a classic example of a situation in which the police power of the state may properly be used for the public protection. Creative County Day School of Sandy Springs, Inc. v. Montgomery County Board of Appeals', 242 Md. 789, 219 A2d 552 (1966).

It may be inferred from plaintiff's claim that it charges a procedural as well as a substantive lack of due process. It did have a full hearing before the Board, at which the admittedly harsh decision of the Department was rescinded. The requirement imposed on plaintiff is within the

sphere of the County's police power and accompanied by sufficient procedural safeguards.

For the foregoing reasons, it is this 29th day of July, 1982, by the United States District Court for the District of Maryland, ORDERED:

That the defendants' motion to dismiss BE, and same IS, hereby GRANTED.

/s/ Joseph Young
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No. Y-82-832

Hagerstown Kitchens, Inc.
Post Office Box 954
Hagerstown, Maryland 21740

Plaintiff

versus

Board of County Commissioners Of
Washington County
Court House Annex
Hagerstown, Maryland 21740

Washington County Department Of
Permits and Inspections
33 West Washington Street
Hagerstown, Maryland 21740

Defendants

Plaintiff, HAGERSTOWN KITCHENS, INC., through its attorney, Paul V. Jorgensen, for its action against the Defendants, alleges and states as follows:

PRELIMINARY STATEMENT

1. This is a civil action in which the Plaintiff seeks declarations against and damages resulting from the Defendants' actions which have caused and constituted deprivations of Plaintiffs' civil rights in violation of the Fourteenth Amendment of the United States Constitution.

JURISDICTIONAL STATEMENT

2. Original jurisdiction exists in this Court pursuant to Title 28 U.S.C. 1343, since this is a civil action authorized by Title 42 U.S.C. 1983, commenced to redress the Plaintiff's damages incurred as a result of actions by the Defendants, taken under color of State law, statue, ordinance, regulation, custom, or usage, to deprive

the Plaintiff of rights, privileges, and immunities secured by the Constitution and laws of the United States.

3. Original jurisdiction also exists in this Court pursuant to Title 28 U.S.C. 1331(a), which grants jurisdiction over federal questions.

PARTIES

4. The Plaintiff, HAGERSTOWN KITCHENS, INC., is a corporation, organized and incorporated under the laws of the State of Maryland. The principal offices of Plaintiff are located in Maryland. Plaintiff does business in more than a dozen states, nationwide.

5. The Defendant, BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, is a duly incorporated and organized under the laws of the State of Maryland.

6. The Defendant, WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, is an agency of the Defendant BOARD OF COUNTY

COMMISSIONERS OF WASHINGTON COUNTY, established to oversee, approve, and control building and building design in Washington County, Maryland.

STATEMENT OF FACTS

7. The governmental structure of Defendant BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY includes the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS. The DEPARTMENT is empowered by State law to regulate building and building design in Washington County, Maryland. People and entities erecting or altering buildings in Washington County are required under most circumstances, to have their plans approved by and to receive permits from the Department before proceeding. The Department and its officials have been delegated policymaking powers by the County government.

8. For a period of time prior to and including June, 1976, it was a custom and

common practice for officers of the Defendant to grant building and use permits to commercial enterprises in Washington County, Maryland, and then later, after substantial reliance and expense incurred on the part of permitees, to revoke permits and impair the uses of the private property.

9. Prior to 1975, Plaintiff, HAGERSTOWN KITCHENS, INC. constructed a warehouse and manufacturing plant on Long Meadow Road in Hagerstown, Maryland. Construction was commenced and completed only after Plaintiff had submitted plans to the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, had those plans approved, and had been issued a permit, and operated out of the facility after it was completed.

10. In the years prior to and including 1976, Plaintiff HAGERSTOWN KITCHENS, INC., expanded its operations at the Long Meadow Road facilities. Several times

during that period, Plaintiff submitted plans for structural additions to the building to the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS. Each time, the plans were approved by the Department and permits were issued. In reliance on those permits, Plaintiff would construct the structural additions as approved and permitted. As each addition was made, Plaintiff would expand its operations to use the new space as part of the existing facility.

11. On or about June 9, 1976, the Building Administrator of the Defendant BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, acting for and on behalf of the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, sent a letter to Mr. Richard A. Young, an officer of Hagerstown Kitchens, Inc., on Department stationery. That letter informed and ordered the Plaintiff that it must install

an automatic sprinkler system throughout the entire Long Meadow Road structure, new and existing, to meet the requirements of the Building Code of Washington County.

12. As a result of this order and various verbal and written threats against the operation of the Plaintiff's business made by officers of the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, the Plaintiff was compelled to halt construction in progress, even though the construction had been authorized by a validly issued permit. Plaintiff was furthered compelled to contract for the services of professional engineers to study the feasibility of and structural requirements for the installation of an automatic sprinkler system.

13. After the order of June 9, 1976, and communications from the State of Maryland Office of the Fire Marshal concerning possible installation of a sprink-

ler system, received by Plaintiff between June and September, 1976, neither the WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS nor any other official agency persued the matter of the lack of sprinkler systems at Plaintiff's Long Meadow Road facilities for nearly four years. During that four-year period, Plaintiff completed construction on its building and carried out normal business operations throughout the building. The construction and uses of the building during this interval were made with the knowledge of officials of the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, including the Director and the Building Administrator.

14. Beginning in May, 1980. Plaintiff began receiving communications concerning the lack of an automatic fire extinguishing system at the Long Meadow Road facility from agents of the office of the Fire Marshal. On or about August 27, 1980,

Plaintiff received a communication, sent by certified mail, from the Director of the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS. The letter indicated that the WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS intended to take formal action and press charges against Plaintiff for purported code violations.

15. Plaintiff appealed the apparent order of the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS to the Defendant BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY. The Commissioners ruled partially in Plaintiff's favor by vacating the apparent order, but by conditioning their ruling by advising Plaintiff that, in the event of any change in use, renovation of, or expansion of the structure, the County would require that the entire structure be served with an automatic sprinkler system.

16. As a result of the initial and ongoing threats of enforcement by the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, through its officials, and of the practical freezing of uses and chilling of incentives to renovate, re-equipt, or expand the existing structure, compelled by the ruling of the Defendant BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, Plaintiff's plans to relocate in another state, and to sell its Maryland facilities, were forestalled. Plaintiff's operations at Long Meadow Road, while allowed to continue, could not expand or change. The facility, previously profitable, thriving, and sanctioned by the local government, as a result of the actions of Defendants became prospectively unsaleable, outmoded, and cramped. Meanwhile, installation of an effective sprinkler system at the warehouse required major structural changes,

demolition and rebuilding, water conduit and pressure provisions, and excavation; none of which would have been necessary had Defendants acted properly in the administration of the building codes.

FIRST CAUSE OF ACTION

(Denial of Due Process)

17. The allegations contained in Paragraphs 1-16 are incorporated herein.

18. Pursuant to the policy and practice alleged in paragraph 10, officials of the Defendant BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, and the Defendant WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS, did review and approve plans and did permit construction as specified on the Long Meadow Road facility owned and operated by Plaintiff. Plaintiff, legally authorized in fact to proceed, commenced and completed substantial construction upon its facility in reliance on the permit and the process which produced it. Defendants subsequehtly, arbit-

rarily and capriciously, but consistently with their policy and practice alleged in Paragraph 10, acted to deprive Plaintiff of permitted uses and of substantial property rights. Those actions have actually damaged Plaintiff in its operations and prospects. Those actions have constituted a denial of due process of law, a right protected by the Fourteenth Amendment of the United States Constitution.

SECOND CAUSE OF ACTION

(Breach of Contract)

19. The allegations contained in Paragraphs 1-16 are incorporated herein.

20. The permit referred to in Paragraph 9 was validly issued for consideration, and the Plaintiff was entitled to rely on it, and did in fact rely on it, in incurring building and other expenses of which the Defendant was aware. Said permit constituted a contractural promise of the Defendants that the Plaintiff

would not be required to undertake further building of its application and followed the plans pursuant to which the permit was issued.

21. The Plaintiff did in fact fulfill the terms of its application and followed the plans pursuant to which the permit was issued. Nevertheless, the County breached its contractural obligation by requiring subsequent modifications as described in Paragraphs 11-18 of this Complaint.

22. As a result of said breach, the Plaintiff has been forced to bear the cost of compliance with the wrongfully administered regulations as well as suffering the damage described in Paragraph 8.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays as follows:

FIRST, That this Court declare that the Defendants acted to deny, and deprived Plaintiff of property and procedural rights

without due process of law;

SECOND, That the Defendants, jointly and severally, be compelled to bear the cost of compliance with the regulations wrongfully administered upon Plaintiff's property;

THIRD, That the Plaintiff, HAGERSTOWN KITCHENS, INC., be awarded One Hundred Seventy-Five Thousand Dollars ($175,000.00) in damages from the Defendants;

FOURTH, That the Plaintiff be awarded punitive damages in an appropriate sum from the Defendants;

FIFTH, That the Plaintiff be awarded all attorney fees and costs;

SIXTH, For such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

/s/ Paul V. Jorgensen
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I, Paul Victor Jorgensen, attorney for the Petitioner Hagerstown Kitchens, Inc., hereby certify that on this 11th day of July, 1983, I served 3 copies of the foregoing Petition for Writ of Certiorari on the Respondent County Commissioners of Washington County and the Respondent Washington County Department of Permits and Inspections by mailing said copies to Paul V. Niemeyer and Michael C. Powell, Attorneys for Respondents, Piper & Marbury, 36 South Charles Street, Baltimore, Maryland 21201.

Paul Victor Jorgensen

PAUL VICTOR JORGENSEN

No. 83-42

FILED
NOV 28
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAGERSTOWN KITCHENS, INC.,
Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY

AND

WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS,
Respondents.

BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY AND WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PAUL V. NIEMEYER,
MICHAEL C. POWELL,
PIPER & MARBURY,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
Attorneys for Respondents.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Is it within the reasonable exercise of police power for Washington County, Maryland to enforce previously enacted building code requirements by requiring Petitioner to install a fire sprinkler system in its plant in connection with any *future* change in use, renovation or expansion of the plant?

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BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY AND WASHINGTON COUNTY DEPARTMENT OF PERMITS AND INSPECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

In 1976, when Hagerstown Kitchens, the Petitioner, began construction of an addition to its warehouse and manufacturing plant in Washington County, Maryland, it

violated existing building code requirements by failing to include in its plans an automatic sprinkler system for fire protection. Although the County issued the building permit without mentioning that requirement, Hagerstown Kitchens was expressly advised of the violation by the County shortly thereafter on two separate occasions. Despite the warnings, Hagerstown Kitchens continued construction.

On August 27, 1980, when construction was completed but a sprinkler system had not been installed, the County ordered Hagerstown Kitchens to install the sprinkler system. Hagerstown Kitchens appealed that order to the Board of County Commissioners, which, following a hearing, decided to grant Hagerstown Kitchens a limited waiver from the building code requirements, but required that a sprinkler system be installed if and when, *at some future date*, there were "changes in use, renovation of, or expansion of the structure." Still unsatisfied, Hagerstown Kitchens appealed the Board's decision to the Circuit Court for Washington County, Maryland. That appeal raised all of the issues asserted in this case by Hagerstown Kitchens, including an allegation that the Board's order unconstitutionally deprived Hagerstown Kitchens of property. After an answer was filed to the appeal, Hagerstown Kitchens voluntarily abandoned the appeal, and the Board's decision became final.

Thereafter, Hagerstown Kitchens filed a new action raising the same issues in the United States District Court for the District of Maryland, seeking relief based on 42 U.S.C. §1983 and the Fourteenth Amendment. The District Court dismissed this action, and the United States Court of Appeals for the Fourth Circuit affirmed, ruling that enforcement of a building code provision for the installation of a fire protection sprinkler system was not the taking of property, that there was no deprivation since

the order only applied to future construction, and that, in any event, the provision requiring the installation of the sprinkler system is a reasonable and constitutional exercise of police powers.

SUMMARY OF REASONS FOR DENYING THE PETITION

The writ of certiorari has been traditionally issued by this Court to decide those novel questions of law whose importance transcends the boundaries of an individual case or about which the federal courts are in disagreement. Measured against those standards, this Petition should be denied.

Whether the Petitioner can be subjected to a restriction requiring it to install a sprinkler system upon a future change in use or structure of its plant raises no constitutional question and is not a subject over which there is any disagreement among the circuits. The right to build a nonconforming structure in violation of existing laws is not a property right which is protected, and all property rights, in any event, are subject to the reasonable exercise of police powers to require fire protection. Moreover, the County in this case waived the provision with respect to the existing nonconforming structure of the Petitioner.

ARGUMENT

THERE HAS BEEN NO UNCONSTITUTIONAL TAKING OF PROPERTY

It is uncontroverted that Hagerstown Kitchens failed to comply with existing building code requirements when it constructed an expansion to its warehouse and manufacturing plant without including an automatic sprinkler system for fire protection. Despite the violation, Hagerstown Kitchens contends that the County is estopped to

enforce the building code requirement because absence of the system was not noticed before a building permit was issued. Hagerstown Kitchens contends that the later enforcement by the County, therefore, was an unconstitutional taking.

Under Maryland law, there is no property interest which can be violated or taken by enforcing a lawfully existing building code requirement. Maryland law recognizes no right to construct a structure which does not comport with existing building codes. *Berwyn Heights v. Rogers,* 228 Md. 271, 179 A.2d 712 (1962). Assuming that the requirement for a sprinkler system is a reasonable one, there can be no estoppel or waiver under Maryland law barring enforcement of a requirement of a public building code that was adopted for the benefit and safety of the public before the building permit was issued. *Berwyn v. Rogers, Ibid.; Lipsitz v. Parr,* 164 Md. 222, 164 A. 743 (1933).

Any property right, in any event, is always subject to the reasonable exercise of police powers to further the public welfare. And a regulation requiring the installation of fire sprinkler systems *in existing* structures has been held to be just such a reasonable restriction by this Court in *Queenside Hills Realty v. Saxl,* 328 U.S. 80 (1964).

In the instant case, Washington County in fact waived the building code requirement with respect to the structure completed in violation of the building code, ordering only that a system be installed in connection with *future* changes in the facility. Since, as this Court held in *Queenside Hills, supra,* it is constitutional to require installation of a sprinkler system in *existing* buildings, such installation can certainly be required for future changes.

Finally, before a court may conclude that there has been an unconstitutional taking of property, the Petitioner

must demonstrate that a regulation or restriction "deprives him of all beneficial use of the property." *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962); *see also, Penn Central Transportation Company v. City of New York*, 438 U.S. 104, *rehearing denied*, 439 U.S. 883 (1978) and *United States v. Central Eureka Mining Company*, 357 U.S. 155, *rehearing denied*, 358 U.S. 858 (1958). No such allegation can be made in this case. On the contrary, the restriction is expressly limited to future changes in the structure.

CONCLUSION

There is no property right to build a structure which is not in conformity with an existing building code, and any property right would be, in any event, subject to the reasonable exercise of police power to require a fire protection sprinkler system. Furthermore, in this case, there was no deprivation of property since the code requirement was waived with respect to Petitioner's nonconforming structure and was imposed only for *future* changes.

The Petition should be denied.

Respectfully submitted,

PAUL V. NIEMEYER,
MICHAEL C. POWELL,
PIPER & MARBURY,
1100 Charles Center South,
36 South Charles Street,
Baltimore, Maryland 21201,
Attorneys for Respondents.

August 10, 1983